Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad

REGIONAL BENCH-COURT NO. 3

Excise Appeal No. 11358 of 2019– DB

(Arising out of OIO-VAD-EXCUS-001-COM-38-18-19 dated 29/03/2019 passed by Principal Commissioner, Central GST and Central Excise, Vadodara-I)

Shri K Baser ....**Appellant**
Vice President of M/s. Sterling Biotech Ltd
Jambusar State Highway, Village Masar, Taluka Padra
Vadodara, Gujarat

VERSUS

COMMISSIONER OF C.E. & S.T.-Vadodara-I ......**Respondent**
1st Floor...Central Excise Building,
Race Course Circle,
Vadodara, Gujarat- 390007

APPEARANCE:
Shri Nikhil Gupta, Advocate & Shri Ikesh Nagpal Chartered Accountant for the Appellant
Shri Mihir G Rayka Additional Commissioner (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. 12952/2024

DATE OF HEARING: 03.10.2024
DATE OF DECISION: 02.12.2024

RAMESH NAIR

This appeal is directed against Order-In-Original No. VAD-EXCUS-001-COM-38-18-19 dated 29.03.2019 passed by the Principal Commissioner, Central GST and Central Excise, Vadodara-I whereby alongwith confirmation of duty demand penalty and interest against the company M/s. Sterlling Biotech Ltd., a penalty or equal amount of duty was also imposed on the appellant Shri K Baser vice president of M/s Sterlling Biotech Ltd, under Rule 26 of Central Excise Rules, 2012. As regard appeal of the company M/s Sterlling Biotech Ltd, the same has been bearing Central Excise appeal No. 10392 to 10401 & 11630/2017 and E/10923/2019 have been disposed of as abated in terms of Rule 22 of CESTAT (Procedure) Rules, 1982 in the light of NCLT order dated 11 November, 2022 whereby the company has been liquidated.

1.1 The issue on merit involved is the denial of exemption admissibility of Notification No. 12/2012-CE (Sr. No. 108) dated 17.03.2012 in respect of the drugs namely:-

1. Idarubicin hydrochloric acid
2.Doxorubicin hydrochloric acid
3.Daunorubicin hydrochloric acid
4.Epirubicin hydrochloric acid
5.Zoledronic Acid

1.2 The case of the department is that appellant's product is Bulk drug which is covered by description No. (B) of Sr. No. 108 of the table appended to notification, according to which there is a condition that for availing the exemption, the assessee is required to follow the procedure laid down in the Central Excise (removal of goods at concessional rate of duty for manufacture of excisable goods) Rules, 2001 and since the appellant have not followed such condition they are not eligible for exemption. The plea of the appellant is that the appellant's product i.e. drugs covered under description No. (A) of the Sr. No. 108 of the table appended to the notification which does not carry condition as prescribed for description No. (v). Therefore, the appellant's product is exempted under Sr. No. 108 description (A) of the Notification. The adjudicating authority rejecting the plea of the company denying the exemption Notification No. 12/2012- CE and consequently confirmed the demand of duty amounting to Rs. 2,60,35,140/- equal amount of penalty and interest on the company and penalty of equal of the duty Rs. 2,60,35,140/- was imposed on the Shri K Baser Vice President of M/s Sterlling Biotech Ltd under Rule 26 on the charge that Mr. K Baser was overall incharge of all the activity. Therefore, he is involved in aiding or abetting the duty evasion done by M/s. Sterlling Biotech Ltd.

1.3 Being aggrieved by the order-in-original, appellant Shri K Baser filed the present appeal.

2. Shri Nikhil Gupta, learned Counsel along with Shri Ikesh Nagpal learned Chartered Accountant appearing on behalf of the appellant submits that the contention of the Revenue is that description (A) of Sr. No. 108 of the notification mentioned drugs specified in the list 3 and 4 appended to the Notification No. 12/2012-CUS dated 17th March, 2012. He submits that drugs mentioned in description (A) also includes Bulk drug. Therefore, the goods in

question are covered under description (A) of Sr. No. 108 of the Notification, hence, unconditionally exempted. He submits that there is no dispute that all the five products are specified in list 3 or list 4 of Notification No. 12/2012-CUS. In support, he placed reliance on the following judgments: -

- Sterling Biotech Limited v. Comm. CGST& CC.E, Vadodra-1, Excise Appeal No. 10923 of 2019.
- Chaithanya Projects Pvt. Ltd. v. Commissioner of Customs, Chennai-II, (2022) 1 Centax 183 (Tri.-Mad)
- Cipla Ltd. v. Commissioner of Customs, Chennai, 2007 (218) E.L.T. 547 (Tri. - Chennai).
- Commissioner of C. EX., Hyderabad v. Hetero Drugs Ltd., 2010 (262) E.L.T. 490 (Tri. - Bang.)
- Commissioner v. S.K. Shah, 2010 (255) E.L.T. A50 (S.C.)
- Commissioner of Customs v. S.K. SHAH, 2009 (245) E.L.T. 48 (Guj.)
- Komatsu India Pvt. Ltd. v. Commissioner of C. EX., Nagpur, 2017 (345) E.L.T. 256
- Burroughs Welcome (I) Ltd.- Vs. CCE & C., Mumbai 2007 (216) ELT 522 (Tri.- Mumbai)
- Cipla Ltd. Vs. C.C. Chennai 2007 (218) ELT 547 (Tri.- Chennai)
- Atrix Laboratories Ltd. Vs. CCE & C. Hyadrabad-I 2009 (233) ELT 372 (Tri.-Bang.)
- CCE Vs. Ginni Filaments 2005 (181) ELT 145 (SC)
- Excon Bldg. Material Mfg. Co. P. Ltd. Vs. CCE 2005 (186) ELT 263 (SC)
- CCE Vs. Sunder Steels 2005 (181) ELT 154 (SC)
- CCE Vs. Mewar Bartan Nirman (2008) 231 ELT 27 (SC)
- CCE Aurangabad Vs. Bajaj Auto Ltd. 2010 (260) ELT 17 (SC)
- Goyal Ispat Limited Vs. CCE Puducherry 2017 (6) GSTL 210 (Tri.-Chennai)
- Star Industries Vs. CC reported in 2015 (324) ELT 656 (SC);
- Larsen and Toubro Ltd. Vs. CCE reported in 2015 (62) Taxman.com(102) (SC);
- Honda Siel Power Products Ltd., reported in 2015 (62) Taxman.com (202) (S.C.);

2.1 He further submits though that the company M/s. Sterlling Biotech Ltd's appeal has been disposed of as abated but they have strong prima facie case on merit. The issue involved is the strict interpretation of the exemption entry, the company M/s. Sterlling Biotech Ltd had been declaring the product description and Notification No. 12/2012-CUS and also the entry Sr. No. 108 in their returns. Therefore, there is no mala fide either on the part of the company or on the part of the present appellant. Therefore, in the nature of the present case, there is charge of aiding or abetting the duty evasion cannot be attributed to the appellant. Therefore, penalty under Rule 26 of Central Excise Rules, 2002 could not have been imposed.

3. Shri Mihir G Rayka, Learned Additional Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. We have carefully considered the submission made by both the sides and perused the records. We find that the appeal of M/s. Sterlling Biotech Ltd has been disposed of as abated under Rule 22 of the CESTAT (Procedure) Rules, 1982. Hence, the company has been liquidated as per the NCLT's order dated 11th November, 2022. But to decide the present appeal, it is necessary to examine the merit of the company's case as the penalty under Rule 26 on the appellant was imposed consequential to the demand of duty on M/s Sterlling Biotech Ltd.

4.1 On examination of the case on merit of M/s Sterlling Biotech Ltd, we find that the dispute is on the exemption entry of the goods in question whether the same would fall under description (A) or (B) of Sr. No. 108 of Notification No. 12/2012-CUS. We find that description (A) grants exemption to drugs and medicines specified in the list No. 3 and 4 of Customs exemption Notification 12/2012-Cus and description (B) provides exemption to bulk drugs used in the manufacture of goods mentioned at (A). The point of dispute is only that whether the drug mentioned at description (A) covers the bulk drugs manufactured by the appellant namely *Idarubicin hydrochloric acid, Doxorubicin hydrochloric acid, Daunorubicin hydrochloric acid, Epirubicin hydrochloric acid, Zoledronic Acid.* This issue has been considered in various judgments which are given below:-

a) In the case of Cipla Ltd (Supra), Tribunal Chennai has given the following findings:-

> ***"5**. In the instant case, admittedly, the 'bulk drugs' imported by the appellants were specifically mentioned in List 3 appended to Sl. No. 80(A) of Customs Notification No. 21/02 and are liable to be considered as 'drugs' mentioned at 80(A). It is beyond doubt that 'bulk drugs' are also 'drugs'. They*

are so defined under the Drugs (Prices Control) Order, 1995 also. The imported goods, which are specified in List 3, must fall within the coverage of 'drugs specified in List 3' and consequently the benefit of Sl. No. 80(A) would be admissible to them in relation to BCD. It would follow that, insofar as CVD is concerned, the benefit of Sl. No. 47(A) of the Central Excise Notification would be available to the goods. We have taken this view upon strict interpretation of the language used in the description of goods under the relevant entries of the Notification, in terms of the Apex Court's ruling in Gujarat State Fertilisers Co. v. CCE - 1997 (91) E.L.T. 3 (S.C.) and other cases cited by learned DR. In the result, all the appeals filed against the appellate Commissioner's order on merits are bound to succeed."

b) In the case of Hetero Drugs Ltd (Supra), this Tribunal has considering the same issue whether the bulk drug and drug is same or otherwise. The relevant part of the order is reproduced below:-

"6. *We have carefully perused the case records and the submissions by both sides. The dispute involved in the subject case is whether "Lopinavir", an item figuring in List 3 appended to the Notification of the Govt. of India, erstwhile Ministry of Finance (Department of Revenue) No. 21/2002-Customs dated 1-3-2002 is entitled to the exemption in terms of the Sl. No. 47(A) of the Notification No. 4/2006-C.E. The impugned item was cleared as bulk drug without following the procedure prescribed in the rules. We find that there is no definition of bulk drugs in the Notification involved. As per the Drugs (Prices Control) Order, 1995, drugs also include bulk drugs. The item "Lopinavir" figures in List 3 of Notification No. 21/2002-Cus. Therefore we find that the impugned clearances of "Lopinavir" are entitled to exemption extended to goods at against Sl. No. 47(A). In terms of the Notification such clearances are entitled to exemption unconditionally.*

7. *We also find that the revenue has no case that the disputed consignments had not been utilized in further production of medicines by the consignee. The assessee was forced to make clearances for further manufacture without the buyer producing the requisite certificate as the jurisdictional Asstt. Commissioner of the buyer firm had not granted the said certificate and had informed them that such certificate was not necessary. In the circumstances, the reliance of the assessee on the decision in the case of M/s. Sundaram Fasteners Ltd. v. CCE [1987 (29) E.L.T. 275 (Tri.-Delhi)] in respect of the claim for the benefit carries considerable force. In the said decision, it was held that the condition which was impossible to comply with because of the action of the revenue should be taken to have been dispensed with. We also note that there is substantial compliance with the requirement of the rules by the assessee.*

8. *The respondents have relied on the following case law :-*

(a) Final Order Nos. 979 and 980/2008 dated 21-8-2008 - 2009 (233) E.L.T. 372 (Tri.) of the Bangalore Bench of the Tribunal in the case of M/s. Astrix Laboratories Ltd. & others v. CCE, Hyderabad.

(b) M/s. Burroughs Wellcome (I) Ltd. v. CCE [2007 (216) E.L.T. 522 (Tri.-Mum.)]

(c) M/s. Cipla Ltd. v. CCE, Chennai [2007 (218) E.L.T. 547 (Tri. Chennai)]

9. *We observe that in the Final Order Nos. 979-980/2008, Bangalore Bench of the Tribunal, had decided a similar dispute involving interpretation of the Notification No. 4/2006-C.E. and its entries Sl. Nos. 47(A) and 47(B). The appellants therein had manufactured and cleared Nevirapine and Stavudine* *figuring at Sl. Nos. 117 and 118 respectively of List 3 appended to Notification No. 21/2002-Cus dated 1-3-2002. As the impugned goods had been bulk drugs, the appellants were required to follow certain conditions. As they had not followed the prescribed conditions, benefit in terms of Sl. No. 47(B) was denied. The Tribunal held that the items Nevirapine and Stavudine figured in List 3 appended to Notification No. 21/2002-Cus. The term 'drug' had to be considered to include bulk drug and formulation, as per the Drugs (Price Control) Rules, both items being bulk drugs were entitled to the benefit of the Notification.*

10. *In the M/s. Burroughs Wellcome (I) Ltd. case, the Tribunal interpreted the following entries at Sl. No. 43 of Notification No. 11/97 C.E.*

Sl. No.	***Chapter or Heading No. or sub-heading No.***	***Description of goods***	***Standard rate***	***Additional duty rate***	***Condition No.***
43	*28, 29, 30 or 38*	*The following goods* *(A) The life saving drugs or medicines (including diagnostic test kits) specified in List 2.*	*Nil*	*Nil*	*--*
		(B) Bulk drugs used in the manufacture of life saving drugs or medicines at (A) above.	*Nil*	*--*	*--*
		(C) Other life saving drugs or medicines.	*Nil*	*Nil*	*7*

The appellants had claimed exemption under Sl. No. 43(B) for bulk drugs used in the manufacture of life saving drugs or medicines at Sl. No. 43(A). The life saving drugs under Sl. No. 43(A) were specified under List 2. The said list specified the impugned drugs imported by the appellants therein. The Tribunal observed as follows :-

"12 .... However, in the instant case, we find that the phrase "life saving drugs" has not been defined either in the notification or in the Drugs (Prices Control) order. Moreover, "drugs" have been defined to include "bulk drugs". As such life saving drugs can also include "bulk drugs". Accordingly, we are of the view that even though the appellants had earlier claimed exemption for the impugned goods stating these to be bulk drugs, they cannot be precluded from claiming the exemption for life saving drugs in respect of the very same impugned goods……………………."

11. *In M/s. Cipla Ltd. case (supra), the Tribunal was concerned with the scope of the exemption extended to goods figuring at Sl. No. 80 of the table to Notification No. 21/02-Cus, which was as follows :-*

Sl. No.	***Chapter or Heading No. or sub-heading No.***	***Description of goods***	***Standard rate***	***Additional duty rate***	***Condition No.***
1	*2*	*3*	*4*	*5*	*6*
80	*28, 29 or 30*	*The following goods, namely*	*5%*	*--*	*--*
		(A) Drugs, medicines, diagnostic kits or equipment specified in List 3			
		(B) Bulk drugs used in the manufacture of drugs or medicines at (A) above.	*5%*	*--*	*5*

The Tribunal observed that undisputedly bulk drugs imported by the appellants found mention in the List 3 referred to at Sl. No. 80(A). It was held that the impugned bulk drugs were liable to be considered as drugs mentioned at Sl. No. 80(A). It was beyond doubt that "bulk drugs" were also 'drugs'. They were so defined under the Drugs (Prices Control) Order, 1995 also. The imported goods which were specified in List 3 must fall within the coverage of the 'drugs' specified in List 3 and consequently the benefit of Sl. No. 80(A) would be admissible to them.

12. *The above judicial authorities amply support our finding that the impugned clearances of 'Lopinavir' were entitled to benefit of the Notification as prescribed at Sl. No. 47(A) of its table. In the circumstances, we sustain the impugned order and reject the appeal filed by the revenue."*

Form the above judgments, it is clear that drugs and bulk drugs are one and the same. Therefore, the company M/s. Sterlling Biotech Ltd was entitled for exemption Notification 12/2012-CUS entry Sr. No. 108 description (A) which does not involve any condition such as following the procedure of Central Excise (removal of goods at concessional rate of duty for manufacture of excisable goods) Rules, 2001. Therefore, entire basis of the department that such procedure was not followed is not relevant. Since, the duty demand itself is not prima facie sustainable on the company, there is no question of imposing personal penalty on the employee of M/s. Sterlling Biotech Ltd. who is the appellant herein.

4.2 We further find that the issue involved is pure interpretation of the notification. The company M/s. Sterlling Biotech Ltd had been declaring the entire facts about the availment of the notification and declaring in their ER-1 return the product discretion, notification number, Sr. number of the entry. Therefore, there was no suppression of fact or mala fide either on the part of the company M/s. Sterlling Biotech Ltd or on the part of the present appellant. For this reason, also the penalty on the appellant is absolutely unsustainable. The appellant have relied upon the decision of S K Shah- 2009 (245) ELT 48 Hon'ble Gujarat High Court wherein on the issue of interpretation of notification personal penalty under Rule 26 was held to be not impossible. The relevant order is reproduced below:-

> *"Both these appeals have been filed by appellant revenue against employees of M/s. Narmada Cement Company Limited and M/s. Ultratech Cement Limited respectively in relation to the same transaction. In case of Ultratech Cement Limited, coal was imported under a license granted under the relevant EXIM policy and it is the case of appellant revenue that some of such imported coal was diverted to Narmada Cement Company Limited amounting to violation of condition No. (vii) of Notification No. 43/2002-CUS. dated 19-4-2002. According to appellant revenue, the two respondents herein, being employees of the two companies, were liable to be penalized as recorded in order in original made by the Commissioner.*
>
> ***2.*** *Heard the learned counsel for the appellant.*
>
> ***3.*** *By two separate orders of even date, appeals of revenue in case of two companies have been admitted on a substantial question of law as to the correct interpretation of conditions stipulated by the aforesaid notification, more particularly condition No. (vii). In light of the impugned order of Tribunal, it is apparent that the question cannot be said to be free from doubt and in the circumstances, insofar as the employees are concerned, at least, the order of the Tribunal deleting penalties, does not require interference.*
>
> ***4.*** *Accordingly, both the appeals are dismissed.*
>
> ***Order in OJCA No. 418/2007 & 419/2007***
>
> *Both the civil applications are not required to be entertained and are accordingly disposed of in light of the orders made in the appeals."*

The above judgement of the Hon'ble Gujarat High Court has been upheld by the Hon'ble supreme court reported as Commissioner Vs. S K Shah 2010 (255) ELT A50 (SC).

5. As per our above discussion and findings which is based on direct judgments on the issue, the penalty imposed on the appellant under Rule 26 is not sustainable. Hence, same is set aside. Appeal is allowed.

(Pronounced in the open court on 02.12.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha